# Sandy M Chiew @ Martinez v James Chiew Siew Hua

HIGH COURT (BRUNEI DARUSSALAM) — PETITION NO 15 OF 2001
MOHAMMED SAIED CHIEF JUSTICE
4 DECEMBER 2002

***Civil Procedure*** *— Jurisdiction — High Court — Divorce — Monogamous marriage celebrated in church — Husband and wife non-Muslim at date of marriage — Husband and wife non-Muslim at date of divorce petition filed by wife in civil High Court — Husband embracing Islam after divorce petition filed by wife — Whether civil High Court had jurisdiction to hear and determine wife's divorce petition — Emergency (Dissolution of Marriage) Order 1992 (Brunei) s 3*

***Civil Procedure*** *— Jurisdiction — Submission to jurisdiction — Party appearing in proceedings before High Court — Application for stay filed by such party — Detailed affidavits filed by such party — Whether party had submitted to jurisdiction of High Court*

***Civil Procedure*** *— Jurisdiction — Syariah Court — Divorce proceeding commenced in Syariah court by Muslim husband — Non-Muslim wife merely writing to Syariah court to inform she was not making any application to it — Non-Muslim wife stating in letter to Syariah court she was not submitting to its jurisdiction — Whether such correspondence constituted a voluntary submission to jurisdiction of the Syariah court by wife*

***Civil Procedure*** *— Res judicata — Similar proceedings in civil law and Syariah law courts — Civil Christian marriage — Divorce order granted in favour of Muslim-convert husband in Syariah court — Divorce petition filed by non-Muslim wife in civil High Court before conversion of husband — Whether proceedings in Syariah court would determine the dissolution of the Civil Christian marriage — Whether doctrine of res judicata would deter non-Muslim wife in seeking the dissolution of her civil Christian marriage*

***Islamic Law*** *— Divorce — Non-Muslim marriage — Whether divorce jurisdiction of Syariah court extends to non-Muslim marriages — Husband in non-Muslim marriage embracing Islam after wife filed for divorce in civil High Court — Whether husband's conversion to Islam would confer jurisdiction on Syariah court to make an order for divorce binding on non-Muslim wife refusing to submit to Syariah court's jurisdiction — Emergency (Syariah Courts) Order 1998 (Brunei), Emergency (Islamic Family Law) Order 1999 (Brunei)*

***Islamic Law*** *— Jurisdiction — Matrimonial matters — Monogamous marriage celebrated in church — Husband and wife non-Muslim at date of marriage — Husband and wife non-Muslim at date of divorce petition filed by wife in civil High Court — Husband embracing Islam after divorce petition filed by wife — Whether civil High Court had jurisdiction to hear and determine wife's divorce petition*

***Islamic Law*** *— Marriage — Dissolution of — Christian marriage between non-Muslims — Husband embracing Islam after divorce petition filed by wife in civil High Court — Whether such marriage capable of registration under the Emergency (Islamic Family Law) Order 1999 (Brunei) — Emergency (Islamic Family Law) Order 1999 (Brunei) s 7*

***Islamic Law*** *— Marriage — Dissolution of — Circumstances under which Syariah court may make an order for divorce — Whether all jurisdictional requirements to be complied*

*with by the Syariah court — Whether Syariah court would lack jurisdiction if one or more jurisdictional requirements not met — Emergency (Islamic Family Law) Order 1999 (Brunei) s 41, 47(2)*

***Islamic Law*** *— Syariah court — Submission to jurisdiction — Mere correspondence by non-Muslim wife to divorce proceedings commenced by Muslim husband — No significant application made in Syariah court by non-Muslim wife — Whether non-Muslim wife had voluntarily submitted to jurisdiction of Syariah court*

The petitioner, a Filipino, married the respondent, a Brunei citizen on 30 July 1989 in Manila. Both at that material time professed the Catholic faith. They lived in Bandar Seri Begawan, Brunei and had three children. They encountered difficulties in their marriage and attempts to draft a divorce petition on agreed terms failed. The petitioner subsequently obtained an ex parte order on 5 May 2001 for the return of the children's passports held by the respondent. The respondent obtained a stay on his undertaking to file an affidavit in opposition by 7 May 2001 and the hearing inter partes was fixed for hearing on 8 May 2001 at 2pm. The petitioner, in the meanwhile, filed her petition for divorce on 7 May 2001. In his affidavit in opposition, the respondent, inter alia, objected to the return of the children's passports claiming that he wanted them to stay in Brunei. On 8 May 2001, the respondent attended the inter partes hearing but produced a certificate of conversion to Islam that was issued to him at 12.20pm that same day. He had also instructed solicitors to file an application in the Syariah Court for the dissolution of his marriage with the petitioner, in accordance with s 47(2) of the Emergency (Islamic Family Law) Order 1999 which had come into force on 6 March 2001. On 12 May 2001, the petitioner filed an amended petition that was served on the respondent's solicitors only on 18 April 2002. The Syariah Court papers were served on the petitioner on or about 6 October 2001. On 5 January 2002, the petitioner's solicitors wrote to the Syariah Court informing the court of the petitioner's instructions not to make any application or submit any affidavit. She would file an appropriate application in the High Court, the Syariah Court was told. The respondent later averred that by the representations made by the petitioner and her solicitors to the Syariah Court, she was deemed to have submitted to the jurisdiction of the Syariah Court. However the petitioner denied that she had ever submitted to the jurisdiction of the Syariah Court and instead pointed out that it was the respondent who had submitted to the jurisdiction of the civil High Court. On 23 January 2002, the Syariah Court dissolved the marriage and gave the respondent custody of the children. The respondent later filed an application to strike out the petitioner's petition. The senior registrar dismissed the application and the respondent appealed. On appeal, counsel for the respondent submitted, inter alia, that the Emergency (Islamic Family Law) Order 1999 (Brunei), which provision came into force on 26 March 2001,

had ousted the jurisdiction of the High Court to deal with the petitioner's divorce petition. The respondent, submitted counsel, had converted to Islam on 8 May 2001 — the day set for the inter partes hearing of the petitioner's application for the return of the children's passports. A

B

**Held**, dismissing the appeal:

(1) In the instant case, all the petitioner had done was to instruct her lawyers to write to the Syariah Court that she was not going to make any application to it and later that she was not submitting to its jurisdiction. Whereas an application for a stay is clearly a voluntary submission to jurisdiction of the court, as indeed is an application to set aside service of court process, here the petitioner did not make any such or any other significant application in the Syariah Court relating to the proceedings that had been launched in that court. There is nothing in the Emergency (Islamic Family Law) Order 1999 that compels a non-Muslim to seek relief in the Syariah Court. The petitioner had also filed her petition in the High Court before the respondent converted to Islam. She had therefore made her choice and this could not be taken against her in any way. There was a lack of appropriate evidence to suggest that she had voluntarily submitted to the jurisdiction of the Syariah Court (see pp 181E–182A). C D E

(2) The respondent's position was however different. He not only appeared before the senior registrar to seek a stay of the order to surrender the children's passports, but he also filed a detailed affidavit in support. His attendance in chambers before the senior registrar and the filing of the affidavit in proceedings commenced by the petitioner in the High Court before his conversion was ample evidence that he had voluntarily accepted the jurisdiction of the High Court (see p 182A–B). F

(3) Section 3 of the Emergency (Dissolution of Marriage) Order 1992, confers upon the civil High Court jurisdiction over, inter alia, matters relating to divorce and is applicable to monogamous marriages celebrated in a church or civil marriage office between parties who are non-Muslim at the date of the divorce petition. Both parties were of the Catholic faith at the time of their church marriage in Manila on 30 July 1989. They were still Catholics on the date of the petition — 7 May 2001 — a day or so prior to the respondent embracing Islam. Thus the civil High Court was the proper forum for the Catholic petitioner to file for divorce (see p 182D–F). G H

(4) The Emergency (Islamic Family Law) Order 1999 does not apply to a Christian marriage between non-Muslims and such a marriage cannot be registered or deemed to be registered under the Order. The respondent failed to fulfill the requirements under I

s 7 of the Emergency (Islamic Family Law) Order 1999. His marriage being a non-Muslim marriage was outside the scope of s 7(2) of the Order so that it could not be deemed to have been registered under the Order. Further, the respondent only having embraced Islam, the marriage fell outside the ambit of s 7(4) of the Order and could not be regarded as having been registered according to the Order (see p 185E–H).

(5) The Emergency (Syariah Courts) Order 1998 and the Emergency (Islamic Family Law) Order 1999 are intended to confer divorce jurisdiction in the Syariah Courts over matters relating to a Muslim marriage only — that is where both parties are Muslim or where one of the parties to the marriage is a Muslim. A singularly conspicuous aspect of these pieces of legislation is the absence of any mention of the position and status of the non-Muslim party to such a marriage or the remedies that might be open to the non-Muslim party. This only emphasized the nature and character of those legislation as applying to Muslim marriages described therein. On the facts, the respondent could not simply rely on his conversion to Islam after the petitioner had filed her petition for divorce, as affording the Syariah Court jurisdiction to make an order of divorce binding in law on the Christian petitioner who had not converted to Islam and who had not submitted to its jurisdiction (see pp 185I–186C).

(6) Save as is otherwise expressly provided, the Syariah Court is authorized to make an order of divorce only in the circumstances mentioned in s 41 of the Emergency (Islamic Family Law) Order 1999. Where either party converts to Islam, that is not by itself sufficient in the scheme of the Order to operate to dissolve the marriage unless confirmed by the court under s 47(2). For such confirmation to enable the Syariah Court to make the order of divorce under s 41, compliance with all the three jurisdictional requirements set out therein with the conjunctive 'and' is absolutely essential. In the absence of any one or more, the court would lack jurisdiction to make an order for divorce. On the facts, the order made by the Syariah Court 'in accordance with the Syariah laws and s 47(2) of the Emergency (Islamic Family Law) Order 1999' dissolving the marriage was confined only to the respondent, since the content, purpose and intention of the laws concerning Islamic divorce clearly indicate that they apply to situations where both parties are Muslim or in the case of a non-Muslim marriage, both parties have embraced Islam or one is a Muslim and the other is not. Thus the non-Muslim petitioner here, unless she had voluntarily submitted to the jurisdiction of the Syariah Court would not be bound by the divorce (see pp 186H–187D).

(7) The order of divorce the Syariah Court announced in favor of the respondent after his conversion to Islam did not bar the Christian

petitioner from proceeding with her petition which she had filed in the High Court before the respondent changed his faith. Since her Christian marriage was not the same as a Muslim marriage and the principles applying to divorce quite different, it could not be said that there was anything in the default judgment which necessarily and with complete precision decided the issue of her divorce in her Christian marriage; *Kok Hoong v Leong Cheong Kweng Mine Ltd* [1964] AC 993 followed. The doctrine of res judicata clearly would not deter her in seeking the dissolution of her Christian marriage (see p 187G–I).

**[Bahasa Malaysia summary**

Pempetisyen, seorang berbangsa Filipino, telah berkahwin dengan responden, seorang warganegara Brunei pada 30 Julai 1989 di Manila. Kedua-duanya pada masa matan menganut agama Katolik. Mereka menetap di Bandar Seri Begawan, Brunei dan mempunyai tiga orang anak. Mereka mengalami kesulitan dalam perkahwinan dan gagal dalam percubaan untuk membuat satu draf petisyen perceraian atas terma-terma yang dipersetujui. Pempetisyen kemudiannya telah mendapat satu perintah ex parte pada 5 Mei 2001 untuk pemulangan pasport-pasport anak-anaknya yang dipegang oleh responden. Responden telah mendapat satu penggantungan atas akujanji beliau untuk memfailkan satu affidavit membangkang pada 7 Mei 2001 dan perbicaraan inter partes telah ditetapkan untuk didengar pada 8 Mei 2001 pada pukul 2 petang. Pempetisyen, sementara itu, telah memfailkan petisyen untuk bercerai pada 7 Mei 2001. Dalam affidavit membangkang, responden, antara lain, telah membantah pemulangan passport-pasport anak-anak beliau dengan mendakwa bahawa beliau inginkan mereka menetap di Brunei. Pada 8 Mei 2001, responden telah menghadiri perbicaraan inter partes tersebut tetapi telah mengemukakan satu sijil pemelukan agama Islam yang telah dikeluarkan kepada beliau pada pukul 12.20 tengahari pada hari yang sama. Beliau juga telah mengarahkan peguamcara untuk memfailkan satu permohonan di Mahkamah Syariah untuk pembubaran perkahwinan beliau dengan pempetisyen, menurut s 47(2) Perintah Darurat (Undang-Undang Keluarga Islam) 1999 yang telah berkuatkuasa pada 6 Mac 2001. Pada 12 Mei 2001, pempetisyen telah memfailkan satu petisyen pindaan yang telah disampaikan ke atas peguamcara responden hanya pada 18 April 2002. Kertas-kertas Mahkamah Syariah telah disampaikan ke atas peguamcara pempetisyen pada 6 Oktober 2001. Pada 5 Januari 2002, peguamcara pempetisyen telah menulis kepada Mahkamah Syariah memaklumkan mahkamah tentang arahan pempetisyen untuk tidak membuat apa-apa permohonan atau menyerahkan affidavit. Beliau akan memfailkan satu permohonan yang sesuai di Mahkamah Tinggi, Mahkamah Syariah telah dimaklumkan. Responden kemudian menegaskan bahawa melalui representasi yang dibuat oleh pempetisyen dan

peguamcara beliau di Mahkamah Syariah, beliau dianggap telah menurut kepada bidang kuasa Mahkamah Syariah. Namun begitu, pempetisyen menafikan bahawa beliau telah menurut kepada bidang kuasa Mahkamah Syariah dan sebaliknya mengatakan bahawa responden yang sepatutnya menurut kepada bidang kuasa Mahkamah Tinggi sivil. Pada 23 Januari 2002, Mahkamah Syariah telah membubarkan perkahwinan tersebut dan memberikan responden hak penjagaan ke atas anak-anak tersebut. Responden kemudian telah memfailkan satu permohonan untuk membatalkan petisyen pempetisyen. Pendaftar kanan telah menolak permohonan tersebut dan responden telah merayu. Semasa membuat rayuan, peguam bagi pihak responden telah mengemukakan, antara lain, bahawa Perintah Darurat (Undang-Undang Keluarga Islam) 1999, peruntukan yang berkuatkuasa pada 26 Mac 2001, telah menyingkir bidang kuasa Mahkamah Tinggi untuk mengendalikan petisyen perceraian pempetisyen. Responden, kata peguam beliau, telah menukar kepada agama Islam pada 8 Mei 2001 — hari yang ditetapkan untuk perbicaraan inter partes permohonan pempetisyen untuk pemulangan pasport-pasport anak-anak mereka.

**Diputuskan**, menolak rayuan tersebut:

(1) Dalam kes semasa, apa yang pempetisyen telah lakukan adalah untuk mengarah peguam beliau menulis kepada Mahkamah Syariah bahawa beliau tidak akan membuat apa-apa permohonan kepadanya dan kemudian beliau tidak akan menurut kepada bidang kuasanya. Manakala satu permohonan untuk satu penggantungan dengan jelas adalah satu pematuhan terhadap bidang kuasa mahkamah, sama seperti satu permohonan untuk mengenepikan penyampaian proses mahkamah, di sini pempetisyen tidak membuat apa-apa atau apa-apa permohonan penting yang lain di Mahkamah Syariah. Tiada apa-apa dalam Perintah Darurat (Undang-Undang Keluarga Islam) 1999 yang memaksa seorang yang bukan Islam memohon relif di Mahkamah Syariah. Pempetisyen juga telah memfailkan petisyen beliau di Mahkamah Tinggi sebelum responden telah menukar kepada agama Islam. Beliau, oleh itu, telah membuat pilihan beliau dan ini tidak boleh digunakan terhadap beliau dalam apa cara sekalipun. Tiada keterangan sesuai yang mencukupi untuk mencadangkan bahawa beliau dengan sukarela menurut kepada bidang kuasa Mahkamah Syariah (lihat ms 181E–182A).

(2) Keadaan responden adalah berlainan. Beliau bukan sahaja hadir di hadapan pendaftar kanan untuk memohon pengantungan perintah untuk memulangkan pasport-pasport anak-anak beliau, tetapi beliau juga telah memfailkan afidavit sokongan yang terperinci. Kehadiran beliau di dalam kamar di hadapan pendaftar kanan dan pemfailan afidavit prosiding yang dimulakan oleh pempetisyen di dalam Mahkamah Tinggi sebelum

penukaran beliau merupakan keterangan yang jelas bahawa beliau telah menurut bidang kuasa Mahkamah Tinggi dengan sukarela (lihat ms 182A–B). A

(3) Seksyen 3 Perintah Darurat (Pembubaran Perkahwinan) 1992 memberikan Mahkamah Tinggi sivil bidang kuasa ke atas, inter alia, hal-hal yang berkenaan penceraian dan terpakai kepada perkahwinan monogami yang diraikan di dalam gereja atau pejabat perkahwinan sivil di antara parti-parti bukan Islam pada tarikh petisyen penceraian. Kedua-dua parti tersebut beragama Katolik semasa perkahwinan gereja mereka di Manila pada 30 Julai 1989. Mereka merupakan Katolik pada tarikh petisyen tersebut — 7 Mei 2001 — sehari atau sebegitu sebelum responden memeluk Islam. Oleh itu, Mahkamah Tinggi sivil merupakan forum yang sesuai untuk pempetisyen Katolik untuk memfail untuk penceraian (lihat ms 182D–F). B C

(4) Perintah Darurat (Undang-Undang Keluarga Islam) 1999 tidak terpakai kepada perkahwinan Kristian di antara orang yang bukan Islam dan perkahwinan seperti itu tidak boleh didaftarkan atau dianggap didaftarkan di bawah Perintah tersebut. Responden telah gagal memenuhi peruntukan di bawah s 7 Perintah Darurat (Undang-Undang Keluarga Islam) 1999. Perkahwinan beliau, yang merupakan perkahwinan bukan Islam, adalah di luar lingkungan s 7(2) Perintah tersebut dan ia tidak boleh dianggap didaftarkan di bawah Perintah tersebut. Lagipun, responden hanya baru memeluk Islam, perkahwinan tersebut adalah di luar lingkungan s 7(4) Perintah tersebut dan tidak boleh dianggap seperti telah didaftarkan mengikut Perintah tersebut (lihat ms 185E–H). D E F

(5) Perintah Darurat (Mahkamah Syariah) 1998 dan Perintah Darurat (Undang-Undang Keluarga Islam) 1999 adalah untuk memberikan bidang kuasa penceraian di dalam Mahkamah-Mahkamah Syariah ke atas perkara-perkara yang berkenaan perkahwinan Islam — iaitu di mana kedua-dua parti merupakan Islam ataupun di mana salah satu daripada parti kepada perkahwinan tersebut adalah Islam. Salah satu aspek undang-undang ini yang nenonjol adalah ketiadaan keadaan dan status parti bukan Islam kepada perkahwinan tersebut disebutkan dan remedi-remedi yang dibuka kepada parti bukan Islam. Ini hanya menekankan sifat undang-undang tersebut yang hanya terpakai kepada perkahwinan Islam yang disebutkan di dalamnya. Pada fakta-fakta, responden tidak boleh bergantung kepada penukaran beliau kepada Islam selepas pempetisyen telah memfailkan petisyen beliau untuk penceraian, sebagai memberikan Mahkamah Syariah bidang kuasa untuk membuat perintah penceraian yang sah di sisi undang-undang ke atas pempetisyen Kristian yang tidak menukar kepada Islam dan yang tidak menurut bidang kuasanya (lihat ms 185I–186C). G H I

(6) Hanya jika ia diperuntukkan sebaliknya dengan nyata, Mahkamah Syariah diberi kuasa untuk membuat perintah penceraian hanya di dalam keadaan-keadaan yang disebutkan di dalam s 41 Perintah Darurat (Undang-Undang Keluarga Islam) 1999. Di mana mana-mana parti parti bertukar kepada Islam, ini dengan sendirinya tidak mencukupi di dalam skema Perintah tersebut untuk berfungsi untuk membubarkan perkahwinan tersebut kecuali ini disahkan oleh mahkamah di bawah s 47(2). Untuk membolehkan pengesahan seperti itu untuk membolehkan Mahkamah Syariah membuat perintah penceraian di bawah s 41, pematuhan kepada ketiga-tiga peruntukan bidang kuasa seperti yang dikemukakan di dalamnya dengan penghubung 'and' adalah sangat perlu. Di dalam ketiadaan salah satu atau lebih, mahkamah tidak mempunyai bidang kuasa untuk membuat perintah untuk penceraian. Pada fakta-fakta, perintah yang dibuat oleh Mahkamah Syariah 'in accordance with the Syariah laws and s 47(2) of the Emergency (Islamic Family Law) Order 1999' yang membubarkan perkahwinan tersebut hanya terhad kepada responden, memandangkan isi, tujuan dan niat undang-undang mengenai penceraian Islam dengan jelas menunjukkan bahawa mereka terpakai kepada keadaan di mana kedua-dua parti tersebut merupakan Islam, ataupun di dalam kes perkahwinan bukan Islam, kedua-dua parti telah memeluk Islam ataupun salah daripada parti adalah Islam dan parti yang lain bukan. Oleh itu, pempetisyen bukan Islam, kecuali beliau dengan sukarela menurut bidang kuasa Mahkamah Syariah, tidak akan terikat oleh penceraian tersebut (lihat ms 186H–187D).

(7) Perintah penceraian Mahkamah Syariah yang diberikan memihak responden setelah penukaran beliau ke Islam tidak menghalang pempetisyen Kristian daripada meneruskan petisyen beliau yang difailkan di dalam Mahkamah Tinggi sebelum responden menukar agama beliau. Memandangkan bahawa perkahwinan Kristian beliau tidak sama dengan perkahwinan Islam dan prinsip-prinsip yang terpakai kepada penceraian adalah berlainan, tidak dapat dikatakan bahawa terdapat apa-apa di dalam penghakiman ingkar yang semestinya dan dengan ketepatan sepenuhnya telah memutuskan isu penceraian di dalam perkahwinan Kristian beliau; *Kok Hoong v Leong Cheong Kweng Mine Ltd* [1964] AC 993 diikut. Doktrin res judicata dengan jelas tidak akan menghalang beliau daripada membubarkan perkahwinan Kristian beliau (lihat ms 187G–I).

**Notes**

For cases on the jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3724–3775.

For cases on submission to jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3881–3883.

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3624–3889.
For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5067–5181.
For cases on divorces, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 443–462.
For cases on jurisdiction under Islamic Law, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 480–513.
For cases on dissolution of marriage, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 538–539.
For cases on the Syariah Court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 584–591.

**Cases referred to**

*Dulles's Settlement (No 2), re, Dulles v Vidler* [1951] Ch 842 (refd)
*Harris v Taylor* [1915] 2 KB 580 (refd)
*Henry v Geoprosco International Ltd* [1976] QB 726 (refd)
*Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 (folld)
*Sneade v Wotherton Barytes and Lead Mining Co* [1904] 1 KB 295 (refd)

**Legislation referred to**

Emergency (Dissolution of Marriage) Order 1992 ss 3, 5
Emergency (Islamic Family Law) Order 1999 ss 5, (2), 7, (1), (2), (3), (4), 41, 47, (2)
Emergency (Syariah Courts) Order 1998 ss 3, 33
Religious Council and Kadis Courts Act ss 48, (1A), 50, 50A
Religious Council & Kadis Courts Act (Amendment) Order
Syariah Courts Act ss 6, 15

*Balwant Singh Sidhu* (*Zul-Sukarla Law Office*) for the petitioner.
*Dayang Hjh Feridahanam Abang Hj Zen* (*DF Abang Zen*) for the respondent.

[*Editorial Note:* Balwant Singh Sidhu is an Advocate and Solicitor of the High Court of Malaya. He was admitted ad hoc to the Supreme Court of Brunei Darussalam on 17 August 2002 on the petitioner's application. He appeared through a Brunei solicitor. The respondent filed an appeal against the decision of the Chief Justice on 19 December 2002.]

**Mohammed Saied Chief Justice Brunei Darussalam**: This is an appeal by the respondent from the order of the senior registrar made on 23 September 2002 dismissing his summons in chambers No 173 of 2002 to strike out the petition on the ground that it showed no reasonable cause

of action and that it was frivolous and vexatious, otherwise an abuse of the court process.

The parties, the petitioner a Filipino and the respondent a citizen of Brunei, were married on 30 July 1989 at the Church of Saint Augustine Convent at Intramuros, Manila, both at the time professing the Catholic faith. They cohabited at Bandar Seri Begawan and have had three children, aged 11, 9 and 6.

It is not disputed that the marriage had some difficulties, because of which the respondent left the matrimonial home towards the end of 1998, taking the three children with him. In March 2001, the petitioner's mother and sister came from the Philippines at the respondent's request to help settle all matters amicably.

The petitioner maintained that they had reached a settlement on 29 March 2001 and the respondent then said that he would draw up a petition of divorce based on the agreed terms. She says in her affidavit in reply of 28 June 2002 that the petition that he drafted did not contain all of the agreed terms and later the respondent told her that he had changed his mind and tried to persuade her to agree to change the terms in respect of the Kilanas house, the financial settlement and the three children. He also refused to hand over the children's passports so that she could return with them to the Philippines as had been agreed but he refused unless she agreed to his terms.

Consequently she applied to this court ex parte for the return of the passports and the order was made on 5 May 2001. The respondent obtained a stay on the undertaking that he would file his affidavit in opposition by 7 May and the hearing inter partes was set down for 8 May at 2pm. In the meantime, the petitioner filed her petition for divorce in this court on 7 May 2001.

The respondent did file his affidavit and in para 12 said that the negotiations 'for an overall settlement broke down as I was unable to meet her increasing and what was fast becoming to be grossly unreasonable demands'. In the next paragraph he said,

> 13 I shall deal with these matters more fully in answer to her petition for divorce which I believe has been filed and will be served on my solicitors shortly.

He objected to the return of the children's passports claiming that he wanted them to stay in Brunei.

The respondent attended the inter partes hearing and produced a certificate of conversion to Islam that was issued to him at 12.20pm on the same day, that is, 8 May 2001, and in the meantime he had instructed Messrs Daud Ismail & Co to file an application in the Syariah Court for the dissolution of his civil marriage with the petitioner in accordance with s 47(2) of the Emergency (Islamic Family Law) Order 1999, which had come into force on the 26 March 2001, and it states:

> The fact that either party to a marriage converts to Islam shall not by itself operate to dissolve the marriage unless confirmed by the court.

Four days after the respondent's conversion to Islam, the petitioner filed an amended petition on 12 May 2001, which was not served on him through his solicitors until 18 April 2002.

The relevant papers of the Syariah Court were served on the petitioner on or about 6 October 2001. The hearing in the Syariah Court of the respondent's application had been set down for 11 October. It is not disputed that subsequently, at the request of the petitioner's solicitors, the hearing was adjourned to 11 December. Again at the request other solicitors, because she was then in the Philippines, the hearing scheduled for 11 December was vacated.

On 5 January 2002, the petitioner's solicitors wrote to the Syariah Subordinate Court informing the judge of the petitioner's instructions not to make any application or submit any affidavit in opposition, as she would file an appropriate application in the High Court.

In para 10 of his affidavit of 21 May 2002, the respondent averred 'by the representations made by the petitioner and her solicitors to the Syariah Court, the petitioner is deemed to have submitted to the jurisdiction of the Syariah Court'. He said there also that the petitioner did not apply for the stay of the proceedings in the Syariah Court.

On 23 January 2002, the Syariah Court dissolved the civil marriage. In the respondent's bundle of papers marked 'Record of Appeal', exhibited with the affidavit of the respondent's counsel is a certified true and correct translation of a document of the Syariah Subordinate Court headed COURT JUDGMENT of the Syar'ie Judge Haji Hassan bin Haji Metali of the Syariah Subordinate Court in 'Mal case no: TC/BM 180/2001' between the parties, the present respondent being the applicant and the present petitioner being the respondent, the original Malay document having been exhibited as MJA–1 to the respondent's affidavit of 21 February 2002. Ignoring the rest of the paras 2–5 for now, para 1 states:

> In accordance with the Syariah Laws and s 47(2) of the Emergency (Islamic Family Law) Order 1999, the court hereby dissolves the marriage between Muhammad Jamil Abas bin Abdul Ali @ James Chiew Siew Hua and Sandy M Chiew @ Martinez, effective from 9 Zulkaedah 1422 corresponding to 23 January 2002.

The rest of the paragraphs deal with the children of the marriage who were placed in the custody and care of their father.

In para 13 of his affidavit, the respondent states:

> 13 In so far as the dissolution of the marriage and the issue of the custody, care and control of the children are part of the subject matter of the amended petition, I aver that these matters have been adjudicated upon by the Syariah Court, a court of competent jurisdiction. These matters are therefore res judicata.

A He claimed that the rest of the matters, that is, the access rights to the children, maintenance and property adjustment sought by the petitioner were within the exclusive jurisdiction of the Syariah Court.

There was then the issue of the application by the petitioner to be allowed to instruct counsel from outside this jurisdiction as she was unable B to retain one locally. In his affidavit filed in opposition, the respondent claimed in para 4.1 that the laws in Brunei Darussalam had settled the issue of the conflicting jurisdiction of the civil courts and the Syariah Courts, those laws being: (1) Religious Council & Kadis Courts Act (Amendment) Order, S31/1990 (Amendments to s 48 Cap 77), (2) Emergency (Syariah Courts) Order 1998 and (3) Emergency (Islamic C Family Law) Order 1999.

The petitioner in her affidavit of 28 January 2002 refutes that contention of the respondent and in para 5 says that her case raised 'novel points of law of public importance' not heretofore argued in our courts, and that the respondent had converted to Islam on the day of the hearing of her D petition for divorce. In paras 9–10 she says:

> 9 I also say that I do not wish to submit to the jurisdiction of the Syariah Court. I have given express instructions to my solicitor that I will not file any application (or affidavit in opposition) in the Syariah Court, even in the pending custody proceedings filed in the Syariah Court by the E respondent.
>
> 10 I say that only the civil High Court has jurisdiction to dissolve my non-Muslim marriage and grant ancillary relief.

In his affidavit made on 21 February 2002 in reply, the respondent has resorted to and repeated in some detail the laws he had mentioned in his F earlier affidavit, namely, the Emergency (Syariah Courts) Order 1998 (S 37/98) and the Emergency (Islamic Family Law) Order 1999 (both of which came into force on 26 March 2001).

The respondent stresses in para 9 of his affidavit that under s 47(2) of the Emergency (Islamic Family Law) Order 1999 'only the Syariah Court G has the jurisdiction to dissolve his non-Muslim marriages in this case and to grant ancillary relief'. Section 47 states:

> (1) The fact that either party to a marriage becomes an apostate or converts to a faith other than Islam shall not by itself operate to dissolve the marriage unless confirmed by the court.
>
> H (2) The fact that either party to a marriage converts to Islam shall not by itself operate to dissolve the marriage unless confirmed by the court.

The petitioner in her affidavit made on 28 June 2002 in reply to the respondent's of 21 May 2002 repeats her contention that at no time had she instructed her solicitors that she was willing to submit to the jurisdiction of I the Syariah Court. She explains there that in the letter dated 24 November 2001 to the Syariah Court by her solicitors she merely informed the court that she was at the time in the Philippines, the next letter of 5 January 2002

that she had instructed her solicitors not to make any application in the Syariah Court. She avers that pursuant to her instructions, her solicitors had written to the Syariah Court on 5 January 2002 that she would not make any applications to the court. Not being satisfied by the wording of the letter she herself wrote to that court to that effect — exh SM–5 in Malay. She maintains in para 14: A B

> I humbly state that at no time had I submitted to the jurisdiction of the Syariah Court. On the other hand it was the respondent who had submitted to the jurisdiction of this Honorable Court.

On 8 June 2002, the respondent filed his application to strike out the petitioner's petition, which the senior registrar dismissed. C

Starting with the issue of the date of the petition, it was filed on 7 May 2001 but was later amended and her solicitors inserted in it the date of the amended petition, that being the date on which the amended petition was filed. Since the date of the filing of the petition seems to have assumed some significance, it is important to remember lest some minds may be confused D about it that an amendment duly made takes effect not from the date when the amendment was made, but from the date of the original document which it amends. Thus when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the beginning: 'the writ as amended becomes the origin of the action; and the E claim thereon indorsed is substituted for the claim originally indorsed' (per Collins MR in *Sneade v Wotherton Barytes and Lead Mining Co* [1904] 1 KB 295 at p 297) — 1999 White Book 20/8/2.

It will be recalled that the petitioner denied that she had ever submitted to the jurisdiction of the Syariah Court, the respondent maintaining that by F virtue of the correspondence that her lawyers had had with that court it is to be 'deemed' that she had accepted the jurisdiction of that court. I have set out above the position of both sides on this issue. I need only refer to *Re Dulles's Settlement (No 2) Dulles v Vidler* [1951] Ch 842 where Evershed MR said at p 847: G

> It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him, and he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits. H

That must be so and has consistently been held so by the courts. However, in *Henry v Geopresco International Ltd* [1976] QB 726, the Court of Appeal was unable to agree with the statement of Denning LJ in *Re Dulles' Settlement (No 2)* that *Harris v Taylor* [1915] 2 KB 580 was not an I authority on what constitutes a submission to jurisdiction and held that the latter is a binding authority on that subject. There, Buckley LJ said at pp 587–588:

> When the defendant was served with the process he had the alternative of doing nothing. ... But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the court and contended that the court had no jurisdiction over him. The court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that court. If the decision of the court on that day had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so.

The court in *Geopresco* made it clear at p 740 that they were 'not deciding that an appearance solely to protest against the jurisdiction is, without more, a voluntary submission', but went on to say at p 748:

> The defendant need not appear there, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him. We appreciate that on this view the dividing line between what is and what is not a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily. But, as we think, it must depend in each case on what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court.

The present case concerns jurisdiction of the local court, but I am inclined to the view that the same observation must apply to the local court also. Here all that the petitioner had done was to instruct her lawyers to write to the Syariah Court that she was not going to make any application to it and later that she was not submitting to its jurisdiction. As was said in *Geopresco,* an application for a stay is clearly a voluntary submission to jurisdiction of the court, as indeed is an application to set aside service of court process. Here, the petitioner did not make any such or any other significant application in the Syariah Court relating to the proceedings that had been launched in that court.

It was suggested that in the light of the prevailing law, that being s 5 of the Emergency (Islamic Family Law) Order 1999, whether to submit to the jurisdiction of the Syariah Court was 'not a choice of hers to make'. Mr Sidhu replied that there is nothing in that Order which compels a non-Muslim to seek relief in the Syariah Court. I am inclined to agree and besides, the petitioner in this case had already filed her petition in the High Court before the respondent converted to Islam. Therefore she had already made her choice and this cannot be taken against her in any way.

Considering the arguments, I fail to see anything said or done by the petitioner to indicate or even suggest that she had voluntarily submitted to the jurisdiction of the Syariah Court. Her position, it seems to me, is and always has been that her civil Christian marriage was not for the Syariah

Court to dissolve. Contrary to what the respondent maintains, there is lack of appropriate evidence that would lead to the conclusion that she had voluntarily submitted to the jurisdiction of that court.

The respondent's position however is markedly different. He not only appeared before the senior registrar to seek a stay of the order, re the surrender of the children's passports, but also filed a detailed affidavit in support. Besides, his attendance in chambers before the senior registrar and the filing of the affidavit in proceedings that had been commenced by the petitioner in the High Court before his conversion is ample evidence that he had voluntarily accepted the jurisdiction of that court. He cannot now in my opinion be heard to disclaim it.

Turning to the legislation, I should point out at the very beginning that s 33 of the Emergency (Syariah Courts) Order 1998 (S 37/98), which came into operation (except for s 3) on 26 March 2001, repealed a number of sections including ss 48, 50 and 50A of the Religious Council and Kadis Courts Act (Cap 77).

Under the provisions of the Emergency (Dissolution of Marriage) Order 1992 (S 16/92), s 3 confers upon the High Court jurisdiction over matters set out therein, including, inter alia, divorce and nullity of marriage, property and financial relief and custody of children, but applicable to marriages monogamous in nature, celebrated either in a church or a civil marriage office and 'between parties, neither of whom, at the date of the petition, is of the Muslim faith'.

It will be recalled that the date of the petition is 7 May 2001, that is, a day or so prior to the respondent embracing Islam. As such both parties being Christians of the Catholic persuasion on that date, 7 May 2001, by virtue of s 3 of the Emergency (Dissolution of Marriage) Order 1992 which was operative at the relevant time, this court was the proper forum for the Catholic petitioner to file for divorce from her Catholic husband.

As already pointed out at the time of their marriage in Manila on 30 July 1989, the parties were of the Catholic faith.

On 26 March 2001, the Emergency (Syariah Courts) Order 1998 and the Emergency (Islamic Family Law) Order 1999 came into operation (S 29/01 and S 25/01), the former becoming the Syariah Courts Act (Cap 184).

Section 5 of the Emergency (Islamic Family Law) Order 1999 states:

(1) Notwithstanding any contrary provisions in any written law, this Order shall apply in any matter in which at least one of the parties professes the Islamic religion and at least one of the parties, whether or not he professes the Islamic religion, in a *bermukim* manner in Brunei Darussalam or in a *bermastautin* in Brunei Darussalam but in a *bermukim* manner outside Brunei Darussalam.

(2) For the avoidance of doubt, it is hereby declared that no court other than a court established under Part II of the Emergency (Syariah Courts)

> Order 1998 shall hear or determine any claims or proceedings where at least one of the parties is a Muslim and related with any matters arising in this Order.

The Order defines 'bermastautin' as 'permanently or ordinarily residing in a certain area' and 'bermukim' as residing without the intention to bermastautin in a certain area whilst not being a traveller.

The courts established under Cap 184 are the Syariah Subordinate Courts, the Syariah High Court and the Syariah Appeal Court having jurisdiction and powers, duties and authority as conferred and imposed by the Act or any other written law.

The respondent's counsel submitted that the issue before this court now is whether s 5 of the Emergency (Islamic Family Law) Order 1999 has ousted the jurisdiction of the High Court to deal with the petition for divorce filed by the petitioner, the respondent having converted to Islam on 8 May 2001, the date that had been set down for the inter partes hearing before the senior registrar, re the passports. Learned counsel submits that 'the content and effect of these provisions is plain enough, which is that the jurisdiction of the High Court in respect of matters previously provided for in the former s 48(1A) and s 50A be now ousted in favour of the Syariah Court'. As already mentioned above, these sections of Cap 77 were repealed with effect from 26 March 2001. Therefore the question simply is whether a Syariah Court established under s 6 of Cap 184 has the sole jurisdiction over the matter that is now before this court, that is, the petition of divorce filed by the petitioner, and be it remembered filed on 7 May 2001 before the respondent's conversion to Islam.

This question of ouster of this court's jurisdiction necessitates a close look at, and consideration of, the various relevant provisions of the law. This review might also touch upon the judgment in default entered by the subordinate Syariah Court dissolving the marriage, but it must be understood however that this exercise concerning ouster of the jurisdiction of this court at the behest of the respondent is in no way meant to criticize or find fault with that judgment or the author of it.

Section 5 of the Emergency (Syariah Courts) Order 1998 (now Cap 184), which is in terms very much similar to s 5(2) of the Emergency (Islamic Family Law) Order, states:

> For the avoidance of doubt, it is hereby declared that no court other than a court established under Part II shall hear or determine any claims or proceedings under the jurisdiction of the Syariah Courts.

Section 15 sets out comprehensively the jurisdiction of the Syariah High Court and it includes, inter alia, marriage, disposition of property, maintenance of dependants or guardianship or custody of infants. This law has to be kept alongside the Emergency (Islamic Family Law) Order 1999 to which reference has already been made earlier. Besides the title, which refers specifically to Islamic Family Law and to none other, and s 5 is

confined to a marriage where one of the parties professes the Islamic religion and none other, so manifestly this law is about what the title professes it to be and none other.

With this law in mind, the question is whether this court has the jurisdiction to entertain and deal with the petition filed by petitioner against the respondent for divorce.

There can be no question that their marriage in Manila on 30 July 1989 was in all respects a Christian monogamous marriage celebrated in a church, between parties neither of whom, at the date of the petition, was of the Muslim faith, and both parties satisfying the requirements of s 5 of the Emergency (Dissolution of Marriage) Order 1992 (No S16) with regard to 'substantial connection' or ordinary residence for at least 12 months immediately preceding the date of the petition in this country, there being no dispute about it at all, and the matters now before this court falling within the scope of sub-ss (a)–(f) of s 3 conferring jurisdiction in the High Court in relation to the matters set out therein, those being '(a) Divorce and nullity of marriage; (b) Judicial separation; (c) Declaration and presumptions of death; (d) Property and financial relief; (e) Custody of children; (f) All such other matters as are ancillary or supplementary to any jurisdiction conferred by this section of the Order', the only way such a marriage could be dissolved was by proceeding in respect of those matters in the High Court.

It is said that the divorce pronounced by the Syariah Court upon the application of the respondent is a valid divorce. By that I take it that it means a divorce binding both parties, dissolving their Christian marriage. The question that deserves an answer is, does the court that dissolved that marriage have the authority and jurisdiction to do so, that is, dissolve a non-Muslim marriage, a union between a man and a woman both at the time of their marriage Catholics and being non-Muslims and satisfying all the requirements of the Emergency (Dissolution of Marriage) Order 1992 at the date of the petition, ie 7 May 2001 when the High Court was clothed with unquestionable jurisdiction to entertain and deal with the petition filed by the petitioner.

Clearly, the answer must be that this marriage being a Christian marriage and was such until 7 May when the petition was filed and continued to remain such until one minute before the husband's conversion at 12.20pm on 8 May 2001 was not the kind of marriage that qualified to be registered or deemed to have been registered under the provisions of the Emergency (Islamic Family Laws) Order 1999. Section 7 of this Order states:

> (1) Nothing in this Order shall affect the validity of any Muslim marriage solemnized under any law wheresoever prior to the date of commencement of this Order.
>
> (2) Every such marriage, if valid by the law under which it was solemnized, shall be deemed to be registered under this Order.

A (3) Every such marriage, unless void by the law under which it was solemnized, shall continued [sic] until dissolved — (a) by the death of one of the parties to the marriage; (b) by such *talaq* as may be pronounced under the Order, (c) by order of a court of competent jurisdiction; (d) by temporary *faraq* order made by a court; or (e) by a declaration of nullity made by a court of competent jurisdiction.

B (4) Marriage between non-Muslims who have embraced Islam according to *Hukum Syara'* shall be regarded as marriages which have been registered according to this Order if they are valid accordance to *Hukum Syara'*.

This was not a marriage in the Islamic sense that could be dissolved in the C Islamic manner and this was so until the time the respondent converted to Islam but by then the petitioner had already filed her petition for divorce in this court.

It was submitted by Mr Sidhu that the Emergency (Islamic Family Law) Order 1999 concerns and applies only to marriages where at least one D of the parties professes or both parties do, the Islamic religion. Section 7(1) talks of a Muslim marriage and so too sub-ss (2) and (3). Important to note here is that any Muslim marriage that was solemnized prior to 26 March 2001 is deemed to be registered under that Order, whereas a marriage between non-Muslims who have embraced Islam according to *Hukum Syara'* (sub-s 4) is regarded as a marriage which has been registered E according to the Order if it is valid under the *Hukum Syara'*. On this basis, it is submitted, and rightly so in my opinion, that this law does not apply to a Christian marriage between non-Muslims and such a marriage cannot be registered nor can it be 'deemed' to be registered under the Order.

This will take us to s 41 of the Islamic Family Law Order, which states:

F

> Save as is otherwise expressly provided, nothing in this Order shall authorise the court to make an order of divorce or to permit a husband to pronounce a *talaq* except —
>
> (a) where the marriage has been registered or deemed to be registered under this Order; and
>
> G (b) where the marriage was contracted in accordance with Hukum Syara; and
>
> (c) where either parties to the marriage at the time when the application is presented is *bermastautin* in Brunei Darussalam.

It is submitted that unless the requirements of this section are fulfilled, H which the respondent does not seem to have accomplished since his marriage, being a non-Muslim marriage, and as such outside the scope of s 7(2) so that it could not be deemed to have been registered under the Order and only the husband having embraced Islam and not both of them, it falls outside the ambit of s 7(4) so that their marriage would not be I regarded as having been registered according to the Order.

Considering the scheme of all this legislation, that is, the Emergency (Syariah Courts) Order 1998 and the Emergency (Islamic Family Law)

Order 1999, it seems to me to be clear that the intention was to confer divorce jurisdiction in the Syariah Courts over matters relating to a Muslim marriage only, that is, where both parties are Muslim, or where one of the parties to the marriage was a Muslim. One aspect of this legislation which may be described as singularly conspicuous is the absence of any mention of the position and status of the non-Muslim party to such a marriage, like the petitioner, or the remedies that might be open to her, which goes to emphasize further the nature and character of this legislation as applying to a Muslim marriage only as described therein.

In the circumstances, as I find the relevant law, the respondent cannot simply rely on his conversion to Islam after the petitioner had filed her petition for divorce, as affording the Syariah Court jurisdiction to make an order of divorce which could be said to binding in law on the Christian party who had not converted to Islam and who had not submitted to its jurisdiction at the time the Syariah Court made the order on the application of the respondent dissolving the marriage on 23 January 2002.

Moreover, under s 41, a Syariah Court is authorized unless otherwise expressly provided to make an order of divorce in the three conjunctive situations specified in (a), and (b) and (c). The conjunctive 'and' connotes togetherness, hence the existence of all the three requirements is an essential absolute for the Syariah Court to be able to make an order of divorce. When and where all three requirements are not available, the court would in my respectful opinion be enjoined from making the order of divorce.

The respondent's counsel's answer to this argument is that their 'position is taken out from s 7' for s 41 to apply.

I am at a loss to understand this submission because the provisions of s 7 apply to Muslim marriages, including marriages between non-Muslims who, that is, both parties to the marriage, have embraced Islam, and under s 5 of the Order, the jurisdiction of the Syariah Courts covers also 'any claims or proceedings where at least one of the parties is a Muslim' and related with any matters arising under that Order.

The respondent's counsel sought not to make much of s 7, saying that it was 'merely a transitional provision' dealing with the recognition of marriages between non-Muslims where both parties convert to Islam and are regarded as marriages which have been registered under the Order. Mr Sidhu argues that the non-Muslim marriage of the parties herein where only one had converted was, as such, not capable of being registered or being deemed to have been registered under the Order. Learned counsel for the respondent takes the view that whereas s 7 talks of the situation where both parties to the non-Muslim marriage convert to Islam, s 47(2) of the Order applies to 'either' party who converts to Islam.

These submissions have to be considered keeping in mind that the Syariah Court is authorized unless otherwise expressly provided in the Order to make an order of divorce only in the circumstances mentioned in s 41. Where either party converts to Islam that is not by itself sufficient in

A the scheme of the Order to operate to dissolve the marriage 'unless confirmed by the court', under s 47(2).

For such confirmation in terms to enable the court to make the order of divorce under s 41, as I have pointed out earlier, compliance with all the three jurisdictional requirements set out therein with the conjunctive 'and' B is absolutely essential, so that in the absence of any one or more the court would lack jurisdiction to confirm or make an order of divorce.

However, the order that was made by the Syariah Court 'in accordance with the Syariah Laws and s 47(2) of the Emergency (Islamic Family Law) Order 1999' dissolving the marriage was, in law as I find it, confined only C to the respondent since the content, purpose and intention of those laws concerning Islamic divorce clearly indicate that they apply to situations where both parties are Muslim or in the case of a non-Muslim marriage, both parties have embraced Islam or one is a Muslim and the other is not. The non-Muslim party, unless he/she has submitted voluntarily to the jurisdiction of the Syariah Court, would not in my opinion be affected or D bound by the divorce, which that court in the exercise of its jurisdiction lawfully announced on 23 January 2002 on behalf of the other party, the respondent, who had converted to Islam.

It must follow, and I so find, that the relevant applicable legislation has not had the effect of ousting the jurisdiction of the High Court in this E present case either at the time the petitioner filed her petition, or thereafter since at no time had she taken any substantial steps in the Syariah Court.

It is against this background that the respondent's submission that, because the Syariah Court had granted him the divorce and ancillary relief that he had sought, the petitioner's claim seeking divorce and ancillary relief F is barred as being res judicata, has to be considered.

Both sides have made reference to a number of cases on this subject. While appreciating their industry in making all that research and expressing my gratitude to them, with respect I do not think that I need dwell on this topic for long, and will only say that in view of what I have held on the issue G of jurisdiction of the courts, that is, the petitioner not being subject to the jurisdiction of the Syariah Court, hence the order of divorce which it announced in favour of the respondent after his conversion to Islam does not bar the petitioner, a Christian, from proceeding with her petition which she had filed in the High Court before the respondent changed his faith. It H follows that because her Christian marriage not being the same as a Muslim marriage and the principles applying to divorce being quite different, it cannot be said that there was anything in that default judgment which 'necessarily and with complete precision' decided the issue of the petitioner's divorce in her Christian marriage: *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49, and as such she is not to be deterred by I the doctrine of res judicata which quite clearly does not apply in such circumstances, from seeking dissolution of her Christian marriage in terms of her petition in this court.

I find that the senior registrar was perfectly right in refusing to strike out the petition. I am of the opinion that the appeal fails and it is dismissed. A

*Appeal dismissed.*

Reported by Andrew Christopher Simon

B

C

D

E

F

G

H

I